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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI

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In the Matters of:

PATRIOT COAL CORPORATION, et al., Case No. 12-51502
Debtors.

- - - - -x

EASTERN ROYALTY LLC f/k/a EASTERN
ROYALTY CORP.,

Plaintiff, Case No. 12-04353

- against -

BOONE EAST DEVELOPMENT CO., et al.,
Defendants.

- - - - -x

MAGNUM COAL COMPANY LLC,

Plaintiff, Case No. 12-04354

- against -

ROYALTYCO, LLC.,

Defendant.

- - - - -x

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United States Bankruptcy Court
111 South 10th Street
4th Floor
St. Louis, Missouri

February 26, 2013
10:12 AM

B E F O R E:
HON. KATHY A. SURRATT-STATES
U.S. BANKRUPTCY JUDGE

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Motion to Appoint Official Retiree Committee Pursuant to 11 U.S.C. Section 1114(d) Filed by Creditor Harold Racer (Riske, Thomas) (1919)

Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property Filed by Debtor (1995)

Motion to Allow and Amend Informal Proofs of Claim or, in the Alternative, Motion to Extend Time to File Timely Proofs of Claim Filed by Creditors Salem Electric Company, West Virginia Electric Industries, Inc., Industrial Resources, Inc., Industrial Contracting of Fairmont Inc. (2604)

Motion for Relief from Stay and Modifications of the Automatic Stay to Enforce Mechanics Liens Filed by Creditors Industrial Contracting of Fairmont, Inc., Industrial Resources, Inc., Salem Electric Company, West Virginia Electric Industries Inc. (2605) - [Order submitted]

Motion to Assume Lease or Executory Contract (Certain Transloading Agreements) by Debtor (2816) - ORDER (2903)

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Motion to Approve Amended Final Order Authorizing the Debtors to (i) Enter Into and Perform Under Coal Sale Contracts in the Ordinary Course of Business and (ii) Establish Certain Procedures With Respect Thereto by Debtor (2817) + Declaration of No Objections (2891) - [Order submitted]

Motion for Authority to Implement Compensation Plans by Debtor (2819)

12-04353 ap EASTERN ROYALTY LLC F/K/A EASTERN ROYALTY CORP V
Motion for Judgment on the Pleadings Pursuant to Rule 12(c) by Plaintiff (16)

12-04354 ap Magnum Coal Company LLC VS Royaltyco, LLC
Motion to Dismiss Adversary Proceeding or in the alternative, for a more definite statement filed by Defendant (10)

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P R O C E E D I N G S

THE CLERK: Please rise. The United States Bankruptcy Court for the Eastern District of Missouri is now in session. The Honorable Kathy A. Surratt-States presiding.

THE COURT: Good morning. Please be seated.

IN UNISON: Good morning, Your Honor.

THE COURT: Good morning. All right, this is the status hearing and other matters that are set in the Patriot Coal matters. Let me first start with appearances on the record in the courtroom, please.

MR. WALSH: Good morning, Your Honor. Brian Walsh from Bryan Cave from the debtors. My colleague Lloyd Palans is here as well. And from Davis Polk & Wardwell we have Brian Resnick, Michelle McGreal, Jonathan Martin, and Benjamin Kaminetzky. And I believe Marshall Huebner, whom you met last time, Your Honor, is on the phone.

THE COURT: All right. Thank you. Good morning.

MR. WILLARD: Good morning, Your Honor. May it please the Court, Greg Willard and Angie Schisler on behalf of the official committee of unsecured creditors. On the phone is my co-counsel Adam Rogoff from the Kramer Levin firm.

THE COURT: Good morning.

MR. WILLARD: Thank you, Judge.

THE COURT: Thank you.

MR. TURNER: Good morning, Your Honor. Marshall

1 Turner on behalf of Citibank as agent for the first out DIP
2 lenders. And also in the courtroom is Joe Smolinsky from Weil,
3 Gotshal & Manges, lead counsel.

4 MR. SMOLINSKY: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MS. LONG: Good morning, Your Honor. Leonora Long and
7 Paul Randolph on behalf of the United States Trustee.

8 THE COURT: Good morning.

9 MR. SOSNE: Good morning, Judge. David Sosne; I'm
10 appearing on behalf of Industrial Contracting of Fairmont, Inc.
11 and its various affiliates. In addition, I'm also appearing on
12 behalf of Alpha Natural Resources, Inc. and its affiliates.
13 That's the adversary matter that's going to be argued later.
14 And with me today are James Bromley and Emily Weiss from the
15 Cleary Gottlieb firm.

16 THE COURT: All right, good morning.

17 MR. RISKE: Good morning, Your Honor. Tom Riske for
18 creditor Harold Racer and those similarly situated non-union
19 retirees. With me in the court today is Mr. Jon Cohen of Stahl
20 Cowen in Chicago.

21 THE COURT: All right, good morning.

22 MR. COHEN: Good morning, Your Honor.

23 MR. HALL: Good morning, Your Honor. John Hall on
24 behalf of Arch Coal Inc. and its various affiliates.

25 THE COURT: Good morning.

1 MR. SCHERCK: Good morning, Your Honor. Randy Scherck
2 appearing on behalf of Bank of America as agent for the pre-
3 petition lenders and the second out DIP lenders. With me I'd
4 like to introduce Ana Alfonso from Willkie Farr & Gallagher.
5 And also on the phone we have Margot Schonholtz and Penelope
6 Jensen, also from Willkie Farr & Gallagher.

7 THE COURT: All right, good morning.

8 MS. ALFONSO: Good morning.

9 MR. SINGER: Hi. I'm James Singer from the St. Louis law
10 firm of Schuchat Cook & Werner, appearing on behalf of the
11 United Mine Workers of America.

12 THE COURT: Good morning.

13 MS. CASE: Good morning, Your Honor. Rebecca Case,
14 local counsel on behalf of Shonk Land Company and Payne-
15 Gallatin Company and Lawson Heirs. Mr. Christopher Smith, lead
16 counsel for Shonk Land Company will not be on the phone today,
17 however Tom Persinger, lead counsel for Payne-Gallatin is on
18 the telephone today. Thank you, Your Honor.

19 THE COURT: All right. Thank you; good morning.

20 MR. GOLDSTEIN: Good morning, Your Honor. Steve
21 Goldstein; Goldstein & Pressman, for Aurelius Capital.

22 THE COURT: Good morning.

23 MR. DOYLE: Good morning, Your Honor. Daniel Doyle on
24 behalf of Caterpillar Financial Services Corporation and five
25 Caterpillar Global Mining entities.

1 THE COURT: Good morning.

2 MS. MAUCERI: Good morning, Your Honor. Rachel
3 Mauceri of Morgan Lewis & Bockius on behalf of the UMWA 1974
4 pension fund and the 1993 benefit fund. I'm here today with
5 our local counsel from Dowd Bennett, James Crowe.

6 THE COURT: Good morning.

7 MR. COUSINS: Good morning, Your Honor. Steven
8 Cousins of Armstrong Teasdale, co-counsel for Peabody Energy
9 Corporation, together with Jones Day. Good morning.

10 THE COURT: Good morning.

11 All right, and then on the phone I believe we have Ms.
12 Jensen on behalf of Bank of America. Ms. Jensen?

13 MS. JENSEN: Yes, I'm here.

14 THE COURT: All right, good morning. And Ms.
15 Schonholtz as well on behalf of Bank of America?

16 MS. SCHONHOLTZ: Good morning, Your Honor. Margot
17 Schonholtz. I'm here.

18 THE COURT: Good morning. All right, and Jason Alter
19 on behalf of Alice Ann Wright, et al.

20 MR. ALTER: Yes, good morning, Your Honor.

21 THE COURT: Good morning. And Mr. Huebner on behalf
22 of the debtors.

23 MR. HUEBNER: Good morning, Your Honor. I'm here.

24 THE COURT: Good morning. And Mr. Rogoff on behalf of
25 the creditors' committee.

1 MR. ROGOFF: Good morning, Your Honor.

2 THE COURT: Good morning. And Chrisandrea Turner on
3 behalf of Argonaut Insurance.

4 MS. TURNER: Yes, Your Honor, good morning.

5 THE COURT: Good morning. All right. And Tom
6 Persinger on behalf of Southern Land Company.

7 MR. PERSINGER: Thank you, Your Honor. Good morning.
8 And today I'm here as Ms. Case indicated, on Payne-Gallatin
9 Company.

10 THE COURT: All right. Thank you.

11 All right, and I'll remind everybody on the phone, if
12 you will please keep your phones on mute except when speaking,
13 that will help us here in the courtroom as well.

14 All right, then, on behalf of the debtors, I believe
15 we should probably take the docket up. Let's start with the
16 matters on page 2 first. First is the motion to appoint the
17 official retiree committee.

18 MR. WALSH: Good morning, Your Honor. Brian Walsh,
19 again, for the debtors. Your Honor, I'd like to introduce to
20 the Court Brian Resnick of the Davis Polk & Wardwell firm. A
21 brief bit of background. Among other engagements, Mr. Resnick
22 represents the joint administrators and liquidators of Lehman
23 Brothers' affiliates in the United Kingdom, as well as the
24 debtor-in-possession lender in the Eastman Kodak case.

25 I will note for the general interest of the Court, Mr.

1 Resnick has two degrees from the Julliard School -- probably
2 the only person in the courtroom who can say that today, Your
3 Honor.

4 THE COURT: Probably.

5 MR. WALSH: He has taken the lead on the matters in
6 the main case today, and so I'll yield the podium to Mr.
7 Resnick.

8 THE COURT: All right. Thank you. Mr. Resnick?

9 MR. RESNICK: Thank you. Good morning, Your Honor.
10 For the record, Brian Resnick of Davis Polk & Wardwell on
11 behalf of Patriot Coal Corporation and its ninety-eight
12 subsidiaries who are Chapter 11 debtors in these cases. As
13 Mr. Walsh mentioned, I'm joined here by my colleagues Ben
14 Kaminetzky, Jonathan Martin, and Michelle McGreal, and Lloyd
15 Palans and Brian Walsh, Patriot's local counsel from Bryan
16 Cave.

17 Your Honor -- as Your Honor suggested, we should begin
18 with the first matter on the agenda, which is the motion to
19 appoint the retiree committee. And I'm happy to give Your
20 Honor a little bit of background on this motion and then
21 discuss the proposed order.

22 So in December of this past year, Your Honor, the
23 debtor sent letters to approximately 600 non-union retirees,
24 informing them that the debtors intended to seek court approval
25 to discontinue or modify certain retiree healthcare and life

1 insurance benefits. The debtors actually sent the letters
2 before year end in order to provide some advance warning to
3 these retirees so that they can perhaps begin to make
4 alternative plans to replace their current benefits.

5 Importantly, Your Honor, these are all benefits that
6 the debtors believe they expressly reserved the right to
7 discontinue or modify. In other words, the actual plan
8 documentation themselves contains express language saying
9 things like: "The company hereby reserves the right to
10 terminate the plan, change the contributions, or modify the
11 plan in whole or in part, at any time, for any reason,
12 including changes in any and all of the benefits provided."
13 That's just an example of some of the language that we find in
14 these plan documents.

15 So before we actually filed the motion to terminate
16 these benefits, on January 8th, Harold Racer, a non-union
17 retiree who received one of these letters, and several
18 similarly situated retirees, filed a motion to appoint an 1114
19 committee. Mr. Racer and those others retirees are represented
20 by Mr. Jon Cohen of the law firm Stahl Cowen, who is here in
21 the courtroom today.

22 Immediately after the motion was filed, debtors
23 reached out to Mr. Cohen in order to try to consensually
24 resolve their request for a committee. The debtors understand
25 and appreciate that the discontinuance of retiree benefits is a

1 very serious matter and Patriot appreciates the hardship that
2 many of the retirees experience from a loss of benefits.
3 However, Patriot believes that the termination of the benefits
4 will not only result in critically needed savings for Patriot,
5 but is also consistent with the need to equitably spread the
6 burden of the debtors' reorganization among all stakeholders.
7 And given the sacrifices that the debtors need from their union
8 and non-union employees and retirees, termination of these
9 benefits, although we understand it's painful for the affected
10 individuals, is important and we believe appropriate.

11 We have thus been working cooperatively with Mr. Cohen
12 and the unsecured creditors' committee and the United States
13 Trustee since the motion was filed, in order to ensure that the
14 retirees get due process and are ably represented by a
15 statutory fiduciary at the debtors' expense, during the
16 process.

17 To be clear, the debtors believe that to the extent
18 that they have the right to unilaterally terminate the
19 benefits, that no retiree committee is required by Section 1114
20 of the Bankruptcy Code. However, we do understand that it is
21 important to ensure that, in fact, the unilateral right of
22 termination exists. In light of this, Patriot has agreed to
23 the appointment of an official Section 1114 committee for the
24 purpose of diligencing whether the benefits are, in fact,
25 amendable under applicable nonbankruptcy law. Of course, if no

1 such right of termination existed, the debtors would have to
2 move under Section 1114. But if, as we believe to be the case,
3 it is determined that the debtors have the unilateral right to
4 terminate, then we would move under Section 363 to terminate.

5 So to effectuate our agreement with Mr. Cohen, we've
6 agreed to a proposed order directing the appointment of an 1114
7 committee with the specified scope and a specified budget. I
8 should mention, in terms of the budget, which is 250,000
9 dollars, while Patriot had initially offered a lower amount,
10 when Mr. Cohen came back to us and said that he really thought
11 that the 250,000 dollar number was the right number to allow a
12 committee to fully diligence the amendability issue, Patriot,
13 and with the full support of the creditors' committee, we
14 decided not to negotiate that number down. If that's what it
15 takes, then Patriot is willing to fund that in order to make
16 sure that the retirees are treated fairly and that no vested
17 benefits are taken from them without going through the 1114
18 process as required by the Bankruptcy Code.

19 In terms of the procedure and the timing, the proposed
20 order contemplates that the United States Trustee would appoint
21 a retiree committee within seven business days after entry of
22 the order. We've provided the U.S. Trustee with contact
23 information for all the retirees yesterday, so the U.S. Trustee
24 is prepared to begin soliciting interest for joining that
25 committee.

1 The debtors will then provide counsel to the retiree
2 committee with the plans and certain other relevant documents
3 and the contact information for all of the covered retirees and
4 respond to discovery requests, et cetera.

5 So the order contemplates that the debtors will file
6 the 363 motion to be heard on the April 23rd omnibus hearing,
7 at which time the debtors will ask the Court to determine
8 whether the debtors have a unilateral right of termination
9 under applicable nonbankruptcy law, and if so, whether they've
10 satisfied the standards under Section 363 in order to terminate
11 the amendable benefits.

12 If the Court grants the Section 363 motion, then in an
13 effort to mitigate the hardship on the affected retirees, the
14 debtors have agreed to provide the retirees with an unsecured
15 claim for benefits that accrue during the entire pendency of
16 the bankruptcy case. And this was agreed to and supported by
17 the creditors' committee as well.

18 If it is determined that some or all of the benefits
19 are actually not subject to the unilateral right of
20 termination, then within seven days after the Court's ruling,
21 the debtors would file a notice saying whether or not they
22 determined to seek to terminate those benefits at that time.

23 In terms of the proposed order, the debtors have
24 provided copies to the Court, the U.S. Trustee, the creditors'
25 committee, and the DIP agents. In addition, the debtors filed

1 a notice of hearing on February 12th, stating that a copy of
2 the proposed order is available on Patriot's case information
3 website. And this notice was mailed to all the retirees that
4 the debtors believe may be impacted by the proposed order. The
5 debtors have not received any formal or informal objections to
6 the proposed order. The unsecured creditors' committee has
7 filed a statement in support of the proposed order. And the
8 debtors have been informed that there are no objections to the
9 proposed order by the U.S. Trustee.

10 We filed a slightly revised order, I believe -- sorry,
11 we posted to the Web site a slightly revised order along with a
12 black-line yesterday. And in the interests of time, because
13 establishing the committee and forming the committee is
14 actually keyed off of the date of entry of the order, we would
15 respectfully request that the order be entered as soon as
16 possible, if Your Honor is so inclined.

17 So unless Your Honor has any questions of me or Mr.
18 Cohen, we'd respectfully request that.

19 THE COURT: All right. No, I have no questions at
20 this time. Are there other parties that wish to be heard on
21 this motion? Mr. Willard?

22 MR. WILLARD: Thank you, Your Honor. Greg Willard for
23 the committee. The committee, as counsel indicated, was very
24 much involved in this process. It is an important issue. It's
25 an important issue to the estate and it's an important issue to

1 the constituents who are directly affected by the proposed
2 action. We reached the conclusion and made the judgment that
3 the agreement that the parties have reached appropriately
4 limits the scope; it appropriately caps the legal fees; but
5 more importantly, Judge, it sets a process to expedite a prompt
6 resolution of these very complex and important issues.

7 On that basis, the committee supports entry of the
8 proposed order as amended, as announced by counsel. The matter
9 may be taken as submitted. Thank you.

10 THE COURT: Thank you. Ms. Long?

11 MS. LONG: Thank you, Your Honor. We did receive,
12 last evening, the list. We are prepared to begin our
13 solicitation upon the entry or the order by the Court. It may
14 take longer than seven business days for issues that aren't
15 within our control. There are factors that might delay the
16 response time by those who are receiving the letter. We're
17 going to send the letter out to a limited number of the people
18 and start the solicitation.

19 So the language in the proposed order just has a
20 little qualifying room saying we intend to do it in seven
21 business days or as soon thereafter as we can, but just to
22 inform Your Honor, that will be filed with the Court -- the
23 appointment will be filed with the Court and we expect to move
24 quite quickly with that. Thank you.

25 THE COURT: All right. Thank you, Ms. Long.

1 Mr. Cohen?

2 MR. COHEN: Your Honor, it's an honor to speak before
3 this Court for the first time. Unlike Mr. Resnick, I don't
4 have any Julliard credentials, but I can play a good six chords
5 on the acoustical guitar. But more importantly, Your Honor, I
6 represented Mr. Racer in this matter and similarly situated
7 retirees. I have had the pleasure of representing
8 approximately eight retiree committees, which in that world, is
9 a significant number. And also, importantly, Your Honor, I've
10 been contacted by about a hundred salaried retirees who
11 expressed support for the efforts with respect to this motion.

12 The original intent of the motion, Your Honor, was to
13 shine some light on the debtors' intent to modify or terminate
14 these benefits and to make sure that there was due process
15 associated with those efforts. By the agreement that has been
16 proffered today, Your Honor, I would suggest that we've
17 accomplished a fair result here that otherwise has saved us
18 significant time and efforts which -- and avoided litigation
19 over that issue.

20 I would note, from a legal standpoint, that the
21 proposed order is consistent with the Farmland decision, in
22 that we have a recognition of an 1114 committee here, in the
23 context of a debtor that at least asserts the right to have a
24 unilateral termination with respect to the plans at issue. And
25 while we did hear a short preview of some of the language that

1 we expect the debtor to rely upon, we -- I can assure your
2 Court that we have already received dozens of historical plan
3 documents that I believe, in the end, are going to show a very
4 different story and demonstrate that, in fact, these benefits
5 would be vested.

6 But, Your Honor, I think that's the importance of this
7 process is that it is a process and that there be someone
8 sitting in the chair, so to speak, to use a common phrase these
9 days, to make sure that what the debtor asserts can, in fact,
10 be vetted.

11 Moreover, Your Honor, we've set up a bifurcated
12 process such that in the event that we get to a point when this
13 Court agrees that some or all of these benefits are vested or
14 at least lifetime benefits, then the scope of the committee
15 will automatically expand unless, under those circumstances,
16 the debtor decides at that point that it's not going to modify
17 or terminate during the bankruptcy process.

18 So I think, Your Honor, we've accomplished quite a
19 lot, and I applaud the cooperation I've received to date with
20 the debtors in crafting what was somewhat of a difficult
21 agreement, and we urge that this Court accept the agreed order.

22 THE COURT: All right, thank you.

23 All right, and are there any parties on the telephone
24 that wish to be heard on this motion?

25 All right. Then hearing none, I will grant the motion

1 and enter the proposed order that has been submitted.

2 MR. RESNICK: Thank you very much, Your Honor.

3 THE COURT: Thank you.

4 MR. RESNICK: Next we have -- next on the agenda we
5 have two motions filed by a group of companies that I will call
6 Fairmont. Happily, Your Honor, we worked with counsel to reach
7 a consensual stipulation and order resolving both motions. The
8 UCC and the DIP agents have signed off on the order as well.
9 The order was submitted to chambers for entry on Friday and
10 also posted to the debtors' case administration Web site. I
11 will let Mr. Sosne, counsel for Fairmont, address the Court on
12 the proposed stipulation and order.

13 MR. SOSNE: Good morning, Judge.

14 THE COURT: Good morning.

15 MR. SOSNE: The -- we filed two separate motions. The
16 first one was a motion to allow and amend informal proofs of
17 claim or in the alternative motion to extend time to file
18 timely proofs of claim. I represent four affiliated mechanics
19 lien claimants that apparently did work at a coal preparation
20 plant or two different plants, of some of the various debtor
21 entities.

22 We filed that motion because when the initial proofs
23 of claims were filed by the claimants, because the account
24 debtors and the -- were different than the entities that owned
25 the real estate, the land upon which was improved, the claims

1 just didn't come out right. But the information was contained
2 in the proofs of claims and in the various notices that were
3 filed that suggest the correction of the claims. As a result,
4 we filed that motion in order to correct it so that we have the
5 appropriate alleged secured claims against the appropriate
6 parties and the unsecured claims against the other appropriate
7 parties.

8 At the same time, since the time period was running
9 for the filing or the enforcement of the mechanics lien suits
10 under West Virginia law, we also filed what I would call more
11 of a comfort motion, on a motion for relief from the automatic
12 stay, in which we wanted to make sure that there was an
13 acknowledgment of the tolling provisions or the extension
14 provisions, so that we didn't have to initiate -- we didn't
15 want to be prevented from enforcing our rights. And so
16 basically, it was a comfort motion that we filed.

17 We've reached a stipulation, as counsel has indicated.
18 We submitted that stipulation to chambers on Friday. In
19 essence, that will correct the various proofs of claims with
20 all the parties reserving their rights to review those claims.
21 And then we agreed to the continuation of the automatic stay
22 with respect to the enforcement action. And so we'll deal with
23 it on a different day.

24 So I think it resolves all of the pending issues that
25 are presently before the Court. I would just be somewhat

1 impertinent, but I will ask that the Court enter this fairly
2 promptly. It is time-sensitive because of the tolling periods
3 were coming due fairly quickly. And so we would ask that the
4 stipulation be entered promptly.

5 THE COURT: All right. Other parties that wish to be
6 heard on these motions? Mr. Willard?

7 MR. WILLARD: Greg Willard for the committee, Your
8 Honor. We have been involved with Mr. Sosne and debtors'
9 counsel, and our comments have been incorporated into the
10 order.

11 Our judgment is that the order that has been tendered
12 to Your Honor is appropriately limited and narrow in scope to
13 give exactly the relief that Mr. Sosne indicated, but nothing
14 sort of beyond the four corners. So in our judgment it's
15 appropriate. The matter may be taken as submitted.

16 THE COURT: All right, thank you. Are there other
17 parties in the courtroom that wish to be heard on these
18 motions?

19 All right, are there other parties on the telephone
20 that wish to be heard on this motion?

21 All right, then hearing none, then I will grant those
22 two motions pursuant to the stipulation that's been submitted
23 to the Court. And we'll have those orders entered promptly.

24 All right, Mr. Resnick?

25 MR. RESNICK: Thank you, Your Honor. Next up, moving

1 to item number 4 on the agenda, it's the debtors' motion to
2 approve an amended coal sale contracts order which was filed on
3 February 12th. The debtors served copies of the proposed order
4 on the UCC the DIP agents and the United States Trustee, and
5 posted in on the case information Web site on February 14th.

6 The objection deadline for the motion passed on
7 February 19th and no objections were filed, as evidenced by the
8 debtors' declaration of no objection filed on February 20th.
9 The debtors submitted the proposed order to chambers on
10 February 20th.

11 Just essentially, Your Honor, there's an ordinary-
12 course coal sale contract order that existed since the
13 beginning -- toward the beginning of the case that the debtors
14 have been operating under. And several potential
15 counterparties have requested certain changes to the order. We
16 don't view them as particularly material, but they requested
17 these changes. So I'm happy to describe them for you or answer
18 any questions Your Honor may have.

19 THE COURT: All right. No, I think that was -- that
20 was my question: how did we get there. I do have a red-line
21 copy of it that I have been reviewing. And it certainly seems
22 to be noncontroversial.

23 MR. RESNICK: Yep. Thank you.

24 THE COURT: Thank you. All right. Mr. Willard?

25 MR. WILLARD: Your Honor, Greg Willard for the

1 committee. The committees' comments were included in the
2 order. I think, as Your Honor will recall, when you were on
3 this side of the podium, creditors very often want comfort
4 orders in this situation. And that is precisely a significant
5 part of what's going on here in an appropriate fashion. The
6 committee, in its review, has concluded that in particular, the
7 order does not confer additional substantive rights to the
8 parties, and therefore we are satisfied with the proposed
9 order. It may be taken as submitted.

10 THE COURT: All right, thank you. Are there other
11 parties in the courtroom that wish to be heard on this motion?

12 All right. And are there parties on the phone that
13 wish to be heard on this motion?

14 All right. Then hearing none, that motion will be
15 granted.

16 MR. RESNICK: Thank you, Your Honor. Moving to the
17 last uncontested matter on the agenda, it's the 365(d)(4)
18 motion with respect to certain of the leases that were
19 adjourned from the last hearing. As Your Honor is aware, the
20 debtors filed their 365(d)(4) motion on January 15th. A
21 hearing was held on the motion on January 29th, and an order
22 was entered on February 13th, approving the assumption of 866
23 leases and the rejection of 2 leases. The 7 remaining filed
24 objections to the motion and were adjourned.

25 And one of those objections has been withdrawn. This

1 is the objection filed by Lawson Heirs. But we're not actually
2 going forward with the assumption of that lease today, because
3 there are unresolved objections by certain other parties.

4 There were two additional counterparties, SCX and Coal
5 River Energy, that submitted informal objections and extended
6 the debtors' time to assume their leases to March 6th. These
7 two informal objections have been resolved, and the debtors are
8 seeking to assume -- approval of the assumption of the leases
9 today. Specifically with respect to Coal River Energy, debtors
10 have agreed to a stipulation and proposed order to resolve
11 their informal objection which the debtors posted on the case
12 information Web site yesterday and served on the United States
13 Trustee, the creditors' committee, and the DIP agents.

14 The stipulation provides for the assumption of two
15 subleases where Patriot is the lessor to Coal River Energy, and
16 two subleases where Patriot is the lessee from Coal River
17 Energy, as well as the related modification agreement and two
18 related consent agreements. The total cure amount for these
19 seven agreements is zero. And the stipulation provides that
20 Patriot is not in default with respect to any of the seven
21 agreements.

22 With respect to CSX, the aggregate cure amount is
23 approximately 8,000 dollars. We've served and posted on the
24 debtors' case information Web site, a proposed order for the
25 assumptions going forward today, which are the various CSX

1 contracts. And we've also sent to the U.S. Trustee, the UCC
2 and the DIP agents, and we've received no objections.

3 So unless Your Honor has any questions, the debtors
4 request entry of the assumption order and the stipulation
5 today. And for the remaining six objections that will not be
6 going forward today, for those to be adjourned and heard on the
7 next scheduled omnibus hearing on March 19th.

8 THE COURT: All right. Are there other parties that
9 wish to be heard on this motion? Mr. Willard?

10 MR. WILLARD: No objections, Your Honor.

11 THE COURT: All right, thank you. All right.

12 MR. RESNICK: I should mention, Your Honor, that we're
13 actually -- we are still working consensually with --
14 cooperatively with the other objectors, and we hope to avoid
15 having a hearing. But --

16 THE COURT: All right. And are there other parties in
17 the courtroom that wish to be heard on this motion? And are
18 there parties on the telephone that wish to be heard on this
19 motion?

20 All right. Then hearing none, I will grant the
21 request and enter the stipulation regarding Coal River Energy,
22 enter the order on assumption on the CSX. And then the other
23 six objections will be continued to March 19th.

24 MR. RESNICK: Thank you very much, Your Honor. That
25 concludes the uncontested portions. And unless Your Honor has

1 any other questions for me or would like to hear a drum solo or
2 something, I will turn the podium over to my colleague,
3 Jonathan Martin, to handle the Eastern Royalty LLC v. Boone
4 East Development Corporation adversary proceeding.

5 THE COURT: All right. Then I have no other questions
6 at this time. So you can proceed with that matter.

7 MR. WALSH: Your Honor, Brian Walsh, again, for the
8 debtors. I'd like to introduce the Court to Jonathan Martin.
9 He's counsel in the litigation department at Davis Polk. He
10 has been involved in litigation in some of the more prominent
11 cases of our recent history, including the Bernard Madoff
12 bankruptcy and the Lehman Brothers bankruptcy. He's a former
13 law clerk to a district judge in the Southern District of New
14 York. And he has a Ph.D. in American history from New York
15 University, probably the only person in the courtroom who can
16 say that, Your Honor.

17 He's going to be arguing the motion in the adversary
18 proceeding today, the motion for judgment on the pleadings.

19 THE COURT: All right.

20 MR. WALSH: And I will yield the podium to him, Your
21 Honor.

22 THE COURT: All right. Thank you. Good morning, Mr.
23 Martin.

24 MR. MARTIN: Good morning, Your Honor. For the
25 record, Jonathan Martin from Davis Polk for debtor Eastern

1 Royalty, LLC. Your Honor, if it's acceptable to you, I'd like
2 to hand up just a brief outline that maps out some of the
3 points I'd like to address today. It also calls out some of
4 the relevant provisions of the contract so we don't have to
5 flip through them.

6 THE COURT: All right. Certainly that's fine. I'm
7 going to assume oppose --

8 MR. MARTIN: I have some for defense counsel.

9 THE COURT: All right. Thank you.

10 MR. MARTIN: And if it would be helpful to have copies
11 of the contracts, I have those as well.

12 THE COURT: Ms. Magnus (ph.), I have those already?

13 THE CLERK: Certainly, Judge.

14 THE COURT: I do have copies of the contract.

15 MR. MARTIN: For purposes of today's discussion, this
16 is just to help facilitate the discussion.

17 THE COURT: All right, thank you.

18 MR. SOSNE: Your Honor, before we start, I just wanted
19 to mention that I'm local counsel for the defendants in
20 connection with that adversary proceeding. And a couple
21 things. First I wanted to introduce Mr. James Bromley, who's
22 going to be handling this matter. And while I don't know his
23 music prowess or his background in that regard, I can tell you
24 I certainly play a mean clarinet and spent the summer at
25 Interlochen National Music Camp in Northern Michigan.

1 But before we begin, we have not seen any of these
2 handouts, and what we would ask the Court to do is if we could
3 take a short break so that we could take a look at these
4 handouts before there's argument --

5 THE COURT: Certainly.

6 MR. SOSNE: -- and that way, we're not at an unfair
7 disadvantage here.

8 THE COURT: All right. How much time would you like,
9 Mr. Sosne?

10 MR. SOSNE: I don't know what the handouts look like.

11 THE COURT: It's about a quarter to 11. So you want
12 to take a recess until about 11 o'clock and eyeball it? If
13 that's not enough time --

14 MR. SOSNE: About a half an hour?

15 THE COURT: About a half an hour? All right. We'll
16 be in temporary recess, then, until 11:15.

17 MR. SOSNE: Okay. Thank you.

18 THE COURT: Um-hum.

19 (Recess from 10:44 a.m. until 11:21 a.m.)

20 THE CLERK: Your Honor, we're back on the record.

21 THE COURT: All right, thank you. Be seated, please.

22 Mr. Sosne, was that enough time?

23 MR. SOSNE: Yes, Your Honor.

24 THE COURT: All right.

25 MR. SOSNE: I think -- Mr. Bromley is going to be

1 taking it from here, okay?

2 THE COURT: All right.

3 MR. MARTIN: I appear to have created a ruckus, Your
4 Honor. I'll let Mr. Bromley explain his position.

5 THE COURT: All right.

6 MR. BROMLEY: Thank you. Good morning, Your Honor.
7 James Bromley of Cleary Gottlieb on behalf of Alpha Natural
8 Resources and certain of its affiliates.

9 We'd like to object to the use of the materials that
10 Mr. Martin has provided. As far as we can tell this is a
11 PowerPoint presentation which constitutes a supplemental
12 pleading filed in the case. As we calculate it right now, the
13 plaintiffs have had sixty-six pages of briefing, if you include
14 the nine pages that they've included in this PowerPoint. We've
15 had simply one reply. This is litigation by ambush to have
16 this handed to us as we're standing up to argue.

17 MR. MARTIN: Your Honor?

18 THE COURT: Mr. Martin.

19 MR. MARTIN: I'm happy to withdraw the handout.
20 What's in the handout is going to be exactly what's in the
21 transcript today. It's my argument. It was meant to help the
22 Court. There's nothing that's in this that I'm not going to
23 say today that you're going to be able to look at in the
24 transcript. But if it's objectionable, I'll withdraw it.

25 THE COURT: All right, then it'll be withdrawn. I'll

1 give you your copy back, Mr. Martin.

2 All right, Mr. Martin. You may proceed.

3 MR. MARTIN: Thank you, Your Honor. Your Honor, I'd
4 like to start with what's not in dispute here, especially given
5 the way we started. The payment agreement standing alone is
6 not an executory contract under Section 365. The contract is a
7 one-way street. We pay them money; they sit back and collect
8 it. They've completed their performance under the contract.
9 And because performance is not due on both sides, the payment
10 agreement is not executory for purposes of Section 365. That
11 means it would be unlawful for ERC -- that's Eastern Royalty --
12 to pay it.

13 Now, that doesn't mean that the defendants get
14 nothing, Your Honor. They get general unsecured claims just
15 like everybody else. And they stand in line just like
16 everybody else.

17 The problem, Your Honor, is that the defendants want
18 to jump the line. They want to get paid a hundred cents on the
19 dollar if they can find a way to do that. Let me explain their
20 plan by focusing on the coal lease, the Boone lease. I'll
21 return to the assignments at the end, Your Honor, but they are,
22 for a number of reasons, a nonissue. And the Boone East lease
23 is the whole ball game here, and it's decisive.

24 Here's their angle, Your Honor. If ERC assumes the
25 lease as it intends to do, and if the payment agreement is held

1 to be a single executory contract with the lease, then ERC has
2 to assume the payment agreement under Section 365. That means
3 they get paid a hundred cents on the dollar. So they figure,
4 why not make that argument? The problem for them, Your Honor,
5 is that the argument is dead on arrival. It violates just
6 about every basic principle of contract law. Let me explain.

7 For a contract to be executory in this circuit, the
8 failure of one party to complete performance under the contract
9 has to excuse the other party's performance under the contract.
10 So what the defendants have to show here, Your Honor, is that
11 if ERC stops paying the payment agreement, they can terminate
12 the lease. That's the only way that they can use the lease to
13 make the payment agreement executory. Now that presents, Your
14 Honor, a plain vanilla question of contract interpretation.
15 Does the lease require payment of the payment agreement?

16 The answer is no. Let's assume this was playing out
17 outside of bankruptcy, that ERC stopped paying the payment
18 agreement and Boone East went into court and argued that it
19 could terminate the lease. The first thing the judge would say
20 to them is point me to where in this lease it says that paying
21 the payment agreement is an obligation of the lease. There'd
22 be deafening silence in the courtroom, Your Honor. They can't
23 point to anything.

24 The words "payment agreement" don't appear anywhere in
25 this lease. Instead, there's a number of provisions that make

1 it impossible to argue -- not just hard to argue, but
2 impossible to argue that the payment agreement is a requirement
3 of the lease. Start with Sections 7 and 8 of the lease, Your
4 Honor. Those provisions set out the rent that we have to pay
5 them. If Boone East thought that the payment agreement was
6 some sort of additional rent under the lease, you would expect
7 it to appear there in Sections 7 and 8. It's not. It is not
8 rent under the lease.

9 Next, Section 19 of the lease; it sets out twenty-two
10 separate events of default. Those are the things that actually
11 do permit Boone East to terminate the lease. They drafted
12 twenty-two of them over five pages of the lease. They took
13 care in drafting them. The payment agreement or failure to pay
14 it, is not an event of default.

15 The finishing blow for them, though, Your Honor, is
16 Section 23.7 of the lease. That section provides, and I quote,
17 "The lease constitutes the sole and entire existing agreement
18 between the parties and expresses all the obligations of and
19 restrictions imposed upon the parties." In other words, Your
20 Honor, Boone East said to us in writing when we entered this
21 lease, all of your obligations under the lease, all of them,
22 are in this lease and nowhere else. There's no other contract,
23 no other agreement, no side letter, no e-mail that says you
24 have any other obligations under this lease.

25 Section 23.7 goes on to make that point totally and

1 completely unambiguous. Again, reading from the section, "All
2 prior agreements and commitments, whether oral or written,
3 between the parties, are either superseded by specific
4 provisions of the lease, or in the absence of such coverage,
5 specifically withdrawn."

6 The point of a provision like that, Your Honor -- it's
7 an entire agreement provision; or a merger clause; or an
8 integration clause -- is to prevent either party from later
9 trying to come back and add obligations to the lease. They
10 can't come back to us, for example, Your Honor, and say you
11 didn't send us a fruit basket on our birthday; the lease is in
12 default. They also can't come back and say you didn't pay the
13 payment agreement; the lease is in default. If it's not in the
14 lease, it's not an obligation of the lease. Never ever.

15 That is clear, unambiguous, and undisputed on the face
16 of the contract. And I submit, Your Honor, that for that
17 reason alone, ERC is entitled to a judgment on the pleadings.
18 The payment agreement is not an executory contract.

19 In fact, if we were outside of bankruptcy, Your Honor,
20 the defendants wouldn't even be making the arguments. ERC
21 stopped paying the payment agreement, they'd sue us for breach
22 of the payment agreement. And they'd get damages. Those
23 damages would make them whole. The problem is that in
24 bankruptcy, the equivalent is filing a general unsecured claim
25 and getting paid cents on the dollar. They want to avoid that.

1 So the defendants have the gall to come forward now in
2 the face of this clear contract and say we want discovery on
3 whether the payment agreement is an obligation of the lease.
4 They might as well want discovery on whether we have to send
5 them a fruit basket on their birthday. The words "fruit
6 basket" don't appear in the lease. The words "payment
7 agreement" don't appear in the lease. You wouldn't even know
8 the payment agreement exists from reading the lease, let alone
9 that it might be an obligation of the lease.

10 But they say, let's take some depositions and see what
11 people say. But that's where they run up against the parol
12 evidence rule, Your Honor. In most cases, discovery makes
13 sense. Gather all the facts, get all the evidence, come back
14 later, we'll sort it all out, figure out what the deal is. Not
15 with contracts. Contracts are interpreted as a matter of law
16 by the Court. We all learned the parol evidence rule in the
17 first weeks of law school. It says you don't get discovery
18 into the parties' intent where the contract is clear and
19 unambiguous. Contracts are enforced according to their terms.

20 Discovery is permissible only when a contract is
21 ambiguous. And that, too, is a question for the Court. It is
22 a question of law. The mere fact that the parties advance
23 competing interpretations of the contract does not make it
24 ambiguous. A contract is ambiguous only if it is open to two
25 reasonable interpretations. Basically the parties were sloppy.

1 They didn't do a good job of articulating their intent, because
2 the contract is open to two plausible -- equally plausible
3 interpretations.

4 In those situations, you have to go behind the
5 contract and get discovery to figure out which one the parties
6 intended. The classic example is a contract for the sale of
7 chicken. Does that mean raw chicken; cooked chicken? If you
8 can't tell from the contract, you have to get discovery and
9 figure it out. That is not this case.

10 The parties were not sloppy here. The parties were
11 not unclear about whether the payment agreement is an
12 obligation of the lease. It's not. If it were, the lease
13 would no longer make sense. We'd suddenly have to pay more
14 rent than what Sections 7 and 8 say we have to pay. There
15 would suddenly be a phantom twenty-third event of default. And
16 Section 23.7, the entire agreement provision, would be gutted.
17 It would have no meaning. It wouldn't be worth the paper it's
18 written on.

19 The defendants cannot make the payment agreement an
20 obligation of the lease without rewriting the lease. And that
21 makes their interpretation of the contract unreasonable as a
22 matter of law. There is no ambiguity.

23 Your Honor, I'd like to turn next to the three
24 arguments that the defendants advance to try to support this
25 argument that the payment agreement is an obligation of the

1 lease, but if the Court has any questions I'm happy to answer
2 them.

3 THE COURT: No, I don't have any questions.

4 MR. MARTIN: Thank you, Your Honor. So the defendants
5 have basically three arguments. Each one is a swing and a
6 miss, three strikes.

7 The first argument is that they note the contracts
8 concern the same commercial transaction. They've collected
9 every case they can find that says when contracts are entered
10 into contemporaneously by the same parties as part of the same
11 transaction, they should be construed together. And they argue
12 that it follows from that that the contracts should also be
13 treated as a single contract. But that is not the law. The
14 one does not follow from the other. That's true in the Second
15 Circuit where we briefed this. It's also true in the Eighth
16 Circuit.

17 I passed up a copy of *In re Craig*, Your Honor, which
18 is from the Eighth Circuit. I hope that's not objectionable.
19 I don't know how a case can be objectionable. But I'd like to
20 read what the Eighth Circuit said about this argument decided
21 under North Dakota law, but basically all states have the same
22 contract law.

23 The court said, "The requirement that the several
24 contracts," meaning in a common transaction, "are to be taken
25 together, does not mean that they are to be joined and thereby

1 become a single contract, but plainly means that they are to be
2 taken together for the purpose of interpreting either the
3 transaction to which they relate or the several contracts
4 themselves. It does not purport to destroy the separate
5 identity of the several contracts and does not do so in
6 effect.". That's strike one, Your Honor.

7 Second, they try to find language in the payment
8 agreement that might help them. They don't even try with the
9 lease. But they note that the payment agreement required
10 execution of the lease and the assignments and attached them as
11 exhibits. And they note that the payment agreement
12 incorporated a defined term from the assignments in the lease.
13 And they note that the payment agreement refers to "additional
14 consideration".

15 The most notable thing here, Your Honor, is that they
16 don't cite a single case that supports a view that those
17 factors alone or together support a conclusion or even a
18 reasonable inference that the payment agreement is an
19 obligation of the lease. We cite a host of cases that
20 demonstrate that those factors are not enough.

21 I'm not going to repeat everything that's in our
22 papers, but I do want to address the argument concerning the
23 phrase "additional consideration" in the payment agreement,
24 because the law here is clear and it does not support them.

25 First of all, this is not a case where one contract

1 requires the other one for consideration. Each of these
2 contracts, the payment agreement and the lease, is supported by
3 independent consideration. There's an exchange of
4 consideration in the payment agreement, a separate exchange of
5 consideration in the lease. That's what courts look at when
6 they're trying to determine whether two contracts are
7 separate -- one of the factors -- whether they have separate
8 and independent consideration. These do.

9 In fact, one of the biggest hurdles for the defendants
10 here is a simple one. I am standing here with the two
11 contracts in two different hands. The parties could have
12 drafted one contract. It would have been easier than drafting
13 two. They could have taken the payment obligations in the
14 payment agreement, added them to the rent in the lease, added
15 another event of default, been done with it. That's not what
16 they did.

17 The parties showed a conscious and deliberate intent
18 to make two separate contracts. And the cases are clear, Your
19 Honor, that when there are multiple contracts that are part of
20 a package of consideration in a common transaction, that does
21 not make them a single contract.

22 I'd like to discuss just briefly In re Refco, Your
23 Honor, which is cited in our papers. The facts of that case
24 are indistinguishable from this one. Tellingly, the defendants
25 completely ignored it in their brief. In that case, the debtor

1 there had purchased a business pursuant to a purchase and sale
2 agreement. And attached to the purchase and sale agreement,
3 the PSA, was an unexecuted agreement that the parties agreed to
4 execute and deliver at the closing of the transaction.

5 The contract, which was called there "an exclusivity
6 agreement", was additional consideration for the transaction,
7 it was also notably not an executory contract. So in the
8 bankruptcy, the seller argued that the exclusivity agreement
9 was integrated with the PSA and had to be assumed along with
10 it. It sounds familiar.

11 The court ruled that even though the exclusivity
12 agreement was attached to the PSA, which required its
13 execution, even though it was part of a package of
14 consideration, the exclusivity agreement was not made executory
15 by the PSA. Why? Quote from the case: "Nowhere in the
16 exclusivity agreement does it provide that the failure to
17 perform a material term of the PSA would constitute a material
18 breach of the exclusivity agreement." You can plug in our
19 contracts into that sentence. Nowhere in the lease does it
20 provide that the failure to perform a material term of the
21 payment agreement would constitute a material breach of the
22 lease.

23 The Eighth Circuit is in accord with this, Your Honor.
24 I also want to address quickly In re Union Financial. Those
25 facts -- the facts of that case are also indistinguishable from

1 those here. There, an asset purchase agreement provided for
2 the sale of a business in exchange for a package of
3 consideration that included cash, an employment agreement, and
4 the issuance of a note payable in the future. The payment
5 agreement is essentially a note, Your Honor.

6 I passed up a copy of Union Financial before, too,
7 Your Honor. And in that case the asset purchase agreement
8 specifically referenced the note as additional consideration
9 for the deal and attached the form copy as an exhibit. In the
10 bankruptcy court, this court, Judge Schermer, concluded that
11 the note was not integrated with the asset purchase agreement
12 or the related employment agreement, because just like here,
13 the contracts, though part of the same common transaction, had
14 different subject matters, had independent consideration, and
15 there was an entire agreement clause, just like Section 23.7 of
16 the lease.

17 So Judge Schermer concluded that the note was not an
18 executory contract. He was affirmed by the district court. He
19 was affirmed by the Eighth Circuit. That's strike two, Your
20 Honor. There is no support in the payment agreement itself for
21 an argument, even an argument, that the payment agreement is an
22 obligation of the lease.

23 Your Honor, defendant's third argument here basically
24 concedes that point. That is, that the payment agreement and
25 the lease don't help them. They look to a third contract, the

1 settlement agreement between third parties Peabody Coaltrade
2 and Massey Coal Sales. They want to show that Coaltrade and
3 Massey Coal Sales intended in their settlement agreement for
4 the payment agreement to be an obligation of our lease with
5 them. You can't make this stuff up, Your Honor.

6 There is no principle of law, none, under which third
7 parties, strangers to a contract, can control its meaning. The
8 actual parties to the contract control its meaning. That's us
9 and them. We are not a party to the settlement agreement.
10 They are not a party to the settlement agreement. Peabody
11 Coaltrade and Massey Coal Sales, they are not parties to our
12 contracts.

13 The intent of those third parties is irrelevant. But
14 in addition, Your Honor, Section 15 of the settlement agreement
15 which is the only provision of that contract that they rely on,
16 doesn't even purport to make the payment agreement an
17 obligation of the lease. There's no way it could.

18 As Your Honor knows from the papers, as part of
19 resolving a litigation between them Peabody Coaltrade and
20 Massey Coal Sales agreed that various of their affiliates would
21 enter into thirteen separate contracts covering various subject
22 matters. The thirteen agreements included the payment
23 agreement and the lease. Section 15 of the settlement
24 agreement is an entire agreement clause. And it says that the
25 settlement agreement plus the thirteen agreements that are

1 attached as exhibits constitute the entire agreement and the
2 "integrated memorial" of their agreement to settle their
3 litigation; "their" being Coaltrade and Massey Coal Sales.

4 The point of that clause is just like Section 23.7 of
5 the lease. It prevents Coaltrade or Massey Coal Sales from
6 ever coming back and saying there's a phantom fourteenth
7 agreement that was also part of our deal. It prevents them
8 from coming back and rewriting the contract.

9 The provision does not purport to and couldn't make
10 those thirteen separate contracts with different parties,
11 different subject matters, different consideration, turning
12 them into a single contract such that the breach of one is the
13 breach of all thirteen. That's not what that provision does.

14 We cite the Rosenblum case, the Megablocks case that
15 refute that argument. They cite nothing that supports it.
16 That's strike three, Your Honor.

17 There is no reasonable argument that the payment
18 agreement might be an obligation of the lease. They can't find
19 one. The interpretation they propose is impossible in face of
20 the plain and unambiguous language of the contract.

21 Your Honor, I'll move on now to just quickly address
22 the assignments, and then I'll wrap up. I could go through all
23 of the same analysis for the assignments, but I'm not going to,
24 because for a number of reasons, they are a nonissue.

25 First, for all the reasons we've explained, the

1 payment agreement is no more an obligations of the assignments
2 than it is of the lease. When you read the assignments,
3 nothing remotely suggests that a thing called the payment
4 agreement even exists, let alone make you think that it might
5 be an obligations of the assignments.

6 But second, Your Honor, on top of that, even if the
7 payment agreement were integrated with each of the
8 assignments -- to be clear, it is not -- the resulting
9 agreements would not be executory. That's because the
10 assignments are not executory.

11 Unlike under the lease, the defendants don't owe us,
12 ERC, any material performance under those contracts. They have
13 substantially performed. All that remains is an indemnity.
14 And in that indemnity, they've agreed to indemnify us for
15 basically three things: their negligence, their breach of
16 contract, and their failure to comply with applicable law. ERC
17 could sue them for all three of those things in the absence of
18 an indemnity. There's no material give there, Your Honor; no
19 material obligation on them that remains. And the cases are
20 clear, and we cite them in our papers, that an indemnity like
21 that cannot make a contract executory.

22 Third, Your Honor, even if the payment agreement were
23 integrated with the assignments, and even if the resulting
24 agreements were somehow executory, ERC could just reject the
25 assignments. That would leave them with general unsecured

1 claims, just the same result as if the contract were not
2 executory. In short, no matter what, the defendants would get
3 general unsecured claims, and that is as it should be.

4 So the only real issue here, Your Honor, is whether
5 Boone East should get a shot at jumping the line, whether they
6 should be allowed to pursue in discovery a theory that the
7 payment agreement is an obligation of the lease. That
8 discovery would be a complete waste of time and resources,
9 resources that ERC, at least, could put to much better use in
10 this bankruptcy.

11 The defendants have not shown that there is any
12 ambiguity here that needs to be clarified. It is simply not
13 reasonable to interpret the lease as requiring payment of the
14 payment agreement. No matter how much discovery is taken, it
15 will never be possible to read the lease in a way that makes
16 the payment agreement an obligation of the lease.

17 Boone East said to us in writing, here's the rent you
18 owe and nothing more. They said here are the twenty-two events
19 of default that will allow us to terminate the lease and
20 nothing more. And they said here's our promise in Section 23.7
21 that all of your obligations under the lease are in this lease,
22 and we will never come back and claim that you have obligations
23 that are not in the lease, that are in some other contract,
24 because any such contract has either been superseded or
25 withdrawn.

1 Even if they put up somebody in deposition that will
2 say whatever they want said, it won't change anything. The
3 contract controls as written. So I submit, Your Honor, it is
4 clear as a matter of law that ERC is entitled to a judgment on
5 the pleadings, that the payment agreement is not an executory
6 contract under Section 365. The contract has zero benefit for
7 the estate, none. It is the classic example of a contract that
8 ERC should shed in this bankruptcy for the benefit of all of
9 its creditors.

10 And I'll note that we have the support of the UCC in
11 this motion. There is no way for the defendants to transform
12 the payment agreement into an executory contract for their
13 benefit alone.

14 Unless the Court has any questions, I'll stop there.

15 THE COURT: All right. No, I have no questions.

16 Thank you.

17 Mr. Bromley?

18 MR. BROMLEY: Thank you, Your Honor. When we were
19 doing the introductions, I found out for the first time that
20 Mr. Martin has a Ph.D. in American history. And I actually
21 think he's probably a magician as well. Because when you do
22 magic, what you do is you make a noise in one direction to
23 distract attention from what's really going on. Because of
24 course, we know, there's no such thing as magic, it's
25 misdirection, it's taking the thing that should be the focus of

1 the conversation and it's making it something completely
2 different.

3 And why do I say that, Your Honor? Well, after
4 listening to Mr. Martin's argument, I think that we're here
5 about a motion on the Boone East lease. But we're not. What
6 we're here for is a motion for judgment on the pleadings. And
7 that would be the pleadings as filed by the debtors here. And
8 they're looking for a judgment on the pleadings under Rule
9 12(c) of the Federal Rules of Civil Procedure, made applicable
10 here by the Federal Rules of Bankruptcy Procedure.

11 And they want a declaratory judgment about the payment
12 agreement. They don't want a declaratory judgment about the
13 Boone East lease. So while Mr. Martin focuses over and over
14 and over again on the Boone East lease, that's not the contract
15 that we have to focus on.

16 Mr. Martin's very good with the adjectives. We have a
17 lot of gall to make this argument. Well, I think there's a lot
18 of gall going around, because the question that Mr. Martin
19 repeated I think ten or fifteen times as the crucial question
20 here is stated as such: whether payments under the payment
21 agreement or performance under the payment agreement, is an
22 obligation of the lease. Again, it's all about the Boone East
23 lease.

24 And I'll get to why I think that's the most important
25 focus of the debtors, it's because it's the only one that's

1 actually operating at the moment in terms of the pieces of
2 property that are at issue here. But, Your Honor, if I may, I
3 think it would be worthwhile to actually look at the payment
4 agreement. And I'm not sure if Your Honor has a copy of the
5 payment agreement?

6 THE COURT: I do.

7 MR. BROMLEY: If I could ask Your Honor to just open
8 up to it?

9 THE COURT: I have it.

10 MR. BROMLEY: And Your Honor, just if I could ask a
11 question; is the one that you have in front of you the one that
12 has, in handwriting, August 31 at the top of the document?

13 THE COURT: It is.

14 MR. BROMLEY: Okay, great. So that is the document
15 that the plaintiffs attached to their complaint. It is the
16 document that we admit is the payment agreement at issue. And
17 so the question that we're trying to address here and that
18 we've raised in our answer and our affirmative defenses, is
19 that at this stage, this very preliminary stage of these
20 proceedings, this adversary proceeding, is the payment
21 agreement, the one that they're trying to get a declaratory
22 judgment as nonexecutory, is that agreement ambiguous at all,
23 such that it's worthwhile to undertake discovery?

24 Now, I'm not going to stand here, like Mr. Martin, and
25 state so unequivocally that there's no argument that he could

1 ever have, there's no position he could ever take. That's not
2 my job. I'm not going to be dismissive of legal argument and
3 state it in absolutes, even though he's done it with our
4 arguments. But it's worthwhile to focus first on the
5 agreement.

6 So Your Honor, if I could ask you, note that the date
7 on the top of the agreement is August 31. That's also the date
8 of the Boone's lease. It's also the date of each of the four
9 partial assignments. And I say partial, because that's
10 important. The terminology that we use when we're discussing
11 these things colors the argument, because if we start saying
12 it's an assignment, well, then it's just an assignment. But
13 it's not just an assignment; it's a partial assignment. What
14 does that mean? It has meaning. It means that we did not
15 assign everything; we've kept some things and we've assigned
16 some things. That goes directly into the teeth of Mr. Martin's
17 argument relating to whether or not the assignments, when
18 integrated into the payment agreement, are executory.

19 The assignments and the payment agreement, when
20 integrated together, as they must, are totally executory, with
21 substantial obligations owing on both sides, and not just
22 obligations relating to indemnities. Even if it was just
23 indemnities, Mr. Martin would lose, but there's a lot more than
24 that.

25 So if I could ask Your Honor to turn, on the payment

1 agreement, to page 3.

2 THE COURT: All right.

3 MR. BROMLEY: And at the top of that it says
4 "witnesses" in capital letters. This is a very critical
5 sentence, Your Honor, because this is where that term
6 "additional consideration" appears. That term "additional
7 consideration", that Mr. Martin dispenses with, with such
8 derision, what it says is: "Now, therefore, as additional
9 consideration for the coal reserves to be assigned" -- it
10 should have an E-D -- "assigned and leased to ERC by the Massey
11 entities", and then, Your Honor, look at the next words,
12 "pursuant to this agreement, the parties agree as follows".

13 The payment agreement -- the payment agreement, this
14 five-page document, which is completely irrelevant, this five-
15 page document, which doesn't warrant a moment's discovery, this
16 five-page document is the document that the parties have signed
17 which says that it's pursuant to this document that the coal
18 reserves are leased and pursuant to this document that the coal
19 reserves were assigned. It's not just a phrase
20 "additional consideration" that's flowing out there in the
21 ether.

22 This isn't some employment agreement that was part of
23 a large group of other agreements, and this has nothing to do
24 with the Refco case. This payment agreement says it is the
25 operative document. This payment agreement says it's this

1 agreement that assigns the coal reserves and it's this
2 agreement that leases the coal reserves.

3 You can't ignore that, because the question that we've
4 raised in our defense is whether or not this payment agreement
5 should be integrated with and read as a single document with
6 the assignments in the Boone East lease. And the answer has to
7 be yes, because you have two documents in front of you today,
8 Your Honor, that say that they leased the coal reserves: the
9 Boone East lease and the payment agreement. Both of them are
10 signed by the same people. Both of them are signed on the same
11 day. Which one's right?

12 We're not allowed to have a single bit of discovery.
13 We're not allowed to have a single document. We're not allowed
14 to ask a single question. We're not even allowed to ask a
15 single question of the lawyers who drafted this, who were ERC's
16 lawyers. We're not allowed to ask those lawyers. And mind
17 you, there's not a single word in any of these agreements that
18 say that, notwithstanding one party's lawyers drafting these
19 documents, they shouldn't be read against the draft. That's
20 law across the country.

21 Every one of these documents drafted by ERC's lawyers,
22 and two of them say that it's that agreement that leases the
23 coal reserves. Which one's right? It is so crystal clear in
24 Mr. Martin's mind that we don't have to go any further. It's
25 so crystal clear that you, Your Honor, should sit here today

1 and say that, notwithstanding the fact that these debtors have
2 said that this will cost my client eighty million dollars, we
3 should finish it today -- today; just write it off,
4 notwithstanding the fact that there are two documents, signed
5 by the same parties, that say the exact same thing.

6 We're not allowed to have any discovery. And you,
7 Your Honor, are not allowed to have any evidence to determine
8 whether or not these things can be read together, what these
9 parties meant. I think that's wrong and I don't think it's the
10 law.

11 When you get past that sentence, Your Honor, it says,
12 "Number one, partial assignments". Again, "partial
13 assignments" -- not the term that Mr. Martin uses over and over
14 and over again, "assignments" -- "partial assignments". And it
15 would be worthwhile, Your Honor, to take a look at a partial
16 assignment, because we talk a lot about these partial
17 assignments. Mr. Martin says they're irrelevant and they're
18 not executory. Well, Your Honor, they're interesting, at
19 least.

20 If I could ask Your Honor to take a look -- and this
21 is -- I'm assuming you have the exhibits to the complaint?

22 THE COURT: I do.

23 MR. BROMLEY: And I'm sorry, they weren't numbered --
24 the pages were not numbered separately. This is Exhibit 5.
25 That's Exhibit 5 to the settlement agreement. It is about

1 one-third of the way through the deck, and it comes right after
2 several maps.

3 THE COURT: Yes, Exhibit 5 to the settlement
4 agreement?

5 MR. BROMLEY: Yeah, it says --

6 THE COURT: I have it.

7 MR. BROMLEY: -- "Exhibit 5, Partial assignment" --

8 THE COURT: Um-hum.

9 MR. BROMLEY: -- "and assumption agreement".

10 THE COURT: Yes.

11 MR. BROMLEY: Exhibit 5, "Partial assumption and
12 assignment agreement", is referred to in the payment agreement
13 under 1(a). It says, "New River and ERC will execute the
14 partial assignment and assumption agreement attached as Exhibit
15 A." Berwind River partial assignment, that's what this is.

16 So what does it say? Well, it says a few things. It
17 does indeed have an indemnity, and I'll get to that last. But
18 in the third "whereas" clause, the third recital, it says
19 "subject to the terms and conditions of this partial
20 assignment, assignor" -- that's my client -- "desires to sell
21 and assign to assignee", Mr. Martin's client. And it talks
22 about the ability to mine the assigned reserves. That's a term
23 that's taken and used in the payment agreement, "assigned
24 reserves". It's defined in every one of the assignment --
25 partial assignment agreements.

1 But then it says, "together with the nonexclusive
2 right to use the surface overlying the assigned reserves" --
3 "together with the nonexclusive right to use the surface
4 overlying the assigned reserves". I think one of the things
5 that we have to recognize, Your Honor, is that we're talking
6 about a coal mining company. This is not -- these mines, these
7 properties are not strip mines, they're not surface mines;
8 these are underground mines.

9 And so when you're talking about the world of coal,
10 you're talking about what's on the top of the ground, straight
11 down, as if the wall has gone all the way to the center of the
12 earth. The fact that this partial assignment gave the right to
13 mine certain coal in that silo, that goes all the way to the
14 heavens and all the way to the center of the earth, doesn't
15 mean that my client doesn't continue to have the right to work
16 on the surface.

17 Just imagine a big hole in the ground and there's
18 something on top of it. Well, why is that important? Can you
19 imagine a more integrated relationship? This is as if I'm
20 leasing out the basement of my house and I'm still living on
21 the first floor. When we're talking about indemnity and
22 continued performance, the idea that Mr. Martin's client is in
23 the basement of my house, digging out coal, and I am living on
24 the first floor playing Wiffle ball with my children, planting
25 rose bushes, mowing the lawn, that is a long-term, integrated

1 relationship, because there are things that Mr. Martin can do
2 underneath my property that can ruin my right to use the
3 property on top, and there are things on the top that I could
4 do to ruin Mr. Martin's right to mine underneath. And oddly
5 enough, I'm not just living upstairs with my family; I'm also a
6 coal mining company.

7 All of these properties are located right next to each
8 other in Boone County, West Virginia. It's not as if these are
9 all put out in self-storage facilities off the highway, and you
10 have a little key to it and you drive up and you open the door
11 and you walk in and there's your coal. There are gigantic
12 trucks, the one you see on mega movers, that are moving things
13 from one point to another: their coal over our property, our
14 coal over their property. They are using our water and our
15 electricity. We're using some of their water and their
16 electricity. We're both coal mining companies and we are,
17 together, exploiting that land.

18 The idea that this document, which is a partial
19 assignment -- they don't get all the rights to it -- is not
20 executory, that there's no ongoing rights between the guy
21 mining in the basement and the guy upstairs driving his
22 gigantic trucks over it -- we talk about gall; this is
23 outrageous, completely ignoring the facts and circumstances of
24 what we're talking about here.

25 These properties are right next to each other; they're

1 all within a stone's throw of each other. And there's an
2 explanation why some were taken and given from them to us and
3 why some from us were given to them, because you know, if
4 there's a seam of coal on the other side of that wall, and I'm
5 mining right here, and I don't have the right to mine it, I
6 can't go. But you know what? If the other guy's over there
7 and he owns the rights to that coal, but I'm in this room in
8 the middle, he can't get to it. So he might own it, but he
9 can't get to it. This was a rearrangement of coal reserves to
10 allow those closest to them to exploit them, so that the guy in
11 that room is now in this room, and he can break through that
12 wall and take that coal. This was an entirely integrated
13 relationship. And every one of these assignment agreements,
14 partial assignment agreements says exactly the same thing.

15 But this Berwind one says something different. It
16 says -- and this is page 4, Your Honor, in the middle:
17 "Additionally, ERC" -- Mr. Martin's client -- "further agrees
18 to pay New River" -- my client -- "for each ton of coal mined
19 and sold, from only those assigned reserves specified in and
20 subject to the Berwind-New River partial assignment, one and a
21 half percent of the gross sales price per ton."

22 In this partial assignment for this coal reserve,
23 anything they take out, we get an additional payment. And why
24 is it important? Well, if you go to the paragraph above it --
25 it's a little -- the copy is a little dirty, at least the one

1 that I have. But what you have is in the paragraph that begins
2 on page 3, and the title of that paragraph is "Tonnage
3 payments". And in the papers filed by the plaintiffs, they
4 refer to these as override payments, and we agree that in the
5 business, the coal business, these tonnage payments are known
6 as override payments.

7 You will see that when we're talking about payments,
8 under payment agreement, that these are the payments we're
9 talking about. And there's A, B, C, D, and E. They correspond
10 with paragraph 1, A, B, C, D, and E. A, B, C, and D are all
11 assignments, partial assignments; you see, I'm even falling
12 into Mr. Martin's trap. E relates to the Boone East lease.

13 So while Mr. Martin went on and on and on about there
14 not being any reference in the Boone East lease to rent,
15 additional rent under that document, this document, in E,
16 refers to override payments relating to the leased coal; leased
17 is a capitalized term. It says "as defined in the Boone East
18 van lease"; that's the Boone East lease that we're talking
19 about.

20 This payment agreement -- this payment agreement says
21 that there are additional payments that have to be made under
22 this agreement for coal mined out of the properties subject to
23 the Boone East lease. In addition to the rent that is paid
24 under the Boone East lease itself, they have to pay more under
25 the payment agreement. Of course you have to look at these two

1 documents as integrated. Why would the payment agreement have
2 a requirement that his client is going to have to pay my client
3 more than what the lease says?

4 Well, let's hop over to Mr. Martin's Boone East lease.
5 And he talked a lot about paragraph 23.7, and that's the
6 integration clause or the merger clause. We had a little
7 argument in the papers about whether it's merger or
8 integration. Frankly, it made my head hurt.

9 But the language in 23.7 is very interesting. It
10 talks about prior agreements, prior documents, prior
11 representations. And it says, "All prior agreements and
12 commitments, whether oral or written, between the parties, are
13 either superseded by specific sections of this lease, or in the
14 absence of such coverage, specifically withdrawn."

15 It's impossible, Mr. Martin says, impossible to read
16 this clause as doing anything else but allowing the Boone East
17 lease to stand alone and unrelated, completely, to payment,
18 because it says all prior agreements and commitments are
19 superseded or withdrawn. But there's a word that Mr. Martin
20 hasn't focused on; it says "all prior agreements" -- prior --
21 prior, before, all agreements before this one.

22 So if you flip over to the next page and you actually
23 look at the signature page, it's interesting. The Boone East
24 lease doesn't itself have a date on the signature page, on page
25 52, but on page 53, there are two notary publics who say that

1 "The foregoing instrument was acknowledged before me this 31st
2 day of August, 2005."

3 I would then ask Your Honor to go back and look at the
4 date on the payment agreement, which is August 31st, 2005. The
5 payment agreement is not a prior agreement; it's a
6 contemporaneous agreement, same time, simultaneously. The
7 Boone East lease integration clause says nothing about
8 contemporaneous documents. This document is not a prior
9 document. This document is not overruled and it's not excluded
10 by the Boone East lease. Contemporaneous, not prior.

11 And if we're going to read the documents strictly,
12 then we have to give due credit to the words that are being
13 used. And remember, these documents were written by Mr.
14 Martin's lawyers. So the idea that the Boone East lease,
15 somehow, with this integration clause or merger clause or
16 whatever we want to say, absolutely cuts the legs out from the
17 payment agreement is just wrong. The two documents, read
18 together, make it clear.

19 So what does that leave us with? Well, let's go back
20 to the payment agreement. There's an obligation in the payment
21 agreement to pay extra money for any coal mined under the Boone
22 East lease. There's an obligation in the payment agreement to
23 pay money for everything mined under the four partial
24 assignments. There's no integration clause in the payment
25 agreement. There's no integration clause that governs the

1 payment agreement in the Boone East lease. There's no
2 integration clause in any of the assignments. In the absence
3 of an integration clause, the question of whether or not the
4 parties intended that the agreements be read together, to be
5 integrated, is a question of the parties' intent. We don't
6 have a dispute about that.

7 And the question boils down to: should we be able to
8 make that decision on the four corners of the document? Well,
9 the document is the payment agreement. That's the relief that
10 they're seeking. They're not seeking a declaratory judgment
11 that these other documents do not reference the payment
12 agreement. They're seeking a declaratory judgment that this
13 payment agreement is not integrated with any other document.
14 They're saying it's nonexecutory. They're saying it has the
15 ability to be rejected right now if it was executory. And
16 anything in here that says that they have to pay anything,
17 completely wiped out. They've said my client will lose eighty
18 million dollars. Yeah, we'll have a proof of claim, under Mr.
19 Martin's scenario. That's not what we're entitled to. We've
20 got six documents here; they're all tightly tied together.

21 And this is when we come down to where we are in terms
22 of the standards, the question of whether or not this is the
23 appropriate time to cut everything out and simply focus on the
24 four corners of this agreement, notwithstanding the fact that
25 it states very clearly that this is the agreement that assigns

1 the coal reserves and that this is the agreement that leases
2 the coal reserves, notwithstanding that -- notwithstanding the
3 fact that it cites all four of the partial assignments plus the
4 Boone East lease, what we're supposed to do is walk away, based
5 on the four corners of this agreement.

6 So what are the pleading standards? Well, you know
7 what I find very odd about this argument is that I am the
8 defendant in this case. And when you sit down and you read all
9 the case law, Iqbal and Twombly, it's all about whether the
10 plaintiff has said enough, whether the plaintiff has made a
11 pleading that's sufficient, whether the plaintiff's pleading is
12 plausible, not probable, but plausible. Why is that? Because
13 it's extraordinarily rare for a plaintiff to file an adversary
14 proceeding, file a complaint, and then, without giving the
15 defendant any ability to conduct any discovery, and
16 notwithstanding the arguments about that agreement that are the
17 subject of the litigation, say that they're entitled to
18 judgment on the pleadings.

19 The burden here on plaintiffs is enormous. And Your
20 Honor, I would argue, and I do argue, that the payment
21 agreement, on its face, makes it absolutely clear that they
22 cannot satisfy that high burden. Even if this was about the
23 Boone East lease, and it's not, there are two documents that
24 say that the reserves at issue are leased under that agreement,
25 the payment agreement and the Boone East lease.

1 I'd like to focus a little bit on the partial
2 assignment agreements again, because Mr. Martin said a lot
3 about executory, and I talked a little bit about the guy in the
4 basement and all that. But there's another provision that is
5 in these partial assignment agreements that he hasn't
6 mentioned, and that there's a very lengthy provision relating
7 to arbitration. That's paragraph 6 -- or section 6, and it's
8 in each one of the partial assignments.

9 According to Mr. Martin's formulation of the world,
10 the assignment agreements are completely performed; there's
11 nothing left -- no material obligation owing in either
12 direction by either party. If that's the case, why would you
13 take the time, when you don't have an integration clause, and
14 you don't have a lot of the standard boiler plate that you have
15 in a corporate agreement, go to the bother of having a
16 three-paragraph arbitration provision? If both parties have
17 fully performed, why in the world would that matter? Well,
18 because there are continuing inter-related operations that are
19 going on. "Any dispute, claim or need for interpretation
20 arising or relating to this partial assignment, or the breach
21 thereof, including but not limited to a claim based on or
22 arising out of an alleged tort."

23 We all know that you can't sue, in contract, for tort
24 claims. The mere fact that they mention tort means that
25 there's an ongoing relationship sufficient enough that the

1 parties are going to potentially run into each other and commit
2 torts, one way or the other, against each other. And that's,
3 of course, totally logical, when you've got two coal mining
4 companies operating at the same physical location trying to
5 mine coal.

6 Mr. Martin also talks about the indemnity, and he
7 says, well, it just states the obvious. This is a coal mining
8 business. I mean, we have a coal mining business and they have
9 a coal mining business. Both our companies do the absolute
10 best to try to operate these coal mines in safe and appropriate
11 fashions. But anyone who's paid any attention to the coal
12 mining business knows that things happen. People get injured.
13 Coal mines collapse. Facilities that retain water that are
14 used to clean things that are full of toxins, sometimes dams
15 give way. People go to jail. People are criminally prosecuted
16 relating to coal mining problems.

17 The idea that in all the cases -- and there are a
18 number of them that say just having indemnity is sufficient to
19 say it's an executory agreement, but to try to sit here and say
20 that an indemnity that's going back and forth, because it's a
21 two-way indemnity between two coal mining companies that are
22 actually mining coal together on the same physical location,
23 somehow is not material, just doesn't make any sense.

24 So when we come back to this arrangement, it's
25 important, maybe, for me to summarize, at least for my own

1 edification, how we ended up here. In July of last year, when
2 the Patriot debtors filed for Chapter 11, they filed a motion
3 for determination of this issue on the first day of the case.
4 The first day, you're filing your petitions, you're filing your
5 motions to make employee payments, you're filing all of the
6 standard first-day motions to keep the business running. They
7 took their time to file a motion to try to break up this
8 integrated document, because they didn't want to pay it. They
9 didn't want to suffer any potential downside. They wanted that
10 decided immediately. They filed a motion not only that said
11 that they want this issue determined, but they wanted it
12 determined retroactively to the petition date, so that if
13 there's an executory contract and they get to reject it, we
14 don't have any post-filing damages because we're now nine
15 months into the case; they all relate back to the petition
16 date.

17 We talked to Judge Chapman in a chambers conference,
18 and it was decided that we were not going to proceed on a
19 motion, and the debtors decided to go forward on the basis of
20 an adversary proceeding. In connection with those discussions,
21 we offered to litigate this, with complete and total discovery,
22 to a trial on the merits by December of last year. That offer
23 was refused.

24 We're not talking about wasting enormous amounts of
25 money. That's a bugaboo that people throw out there when they

1 have something to hide. We have the right to discovery. We've
2 been sued. These agreements are ambiguous, at best, on their
3 face. But to the extent that they're clear, they're clear in
4 our favor. And notwithstanding the hostility of the comments
5 that have been made by debtors' counsel, we have been entirely
6 willing to litigate this in a very efficient and prompt manner,
7 because it would be helpful for this Court, before it makes a
8 decision on such a material issue, if it has all of the facts
9 in front of him, because Your Honor, this is really a facts and
10 circumstances analysis.

11 The four corners of these agreements -- and there's
12 only one that they've actually put in front of you that the
13 four corners count -- aren't enough. To talk about the payment
14 agreement, the debtors themselves, by attaching an inch and a
15 half worth of material, indicate that the payment agreement
16 relates to a lot more than simply the four corners of that
17 document. The language itself, of the payment agreement and
18 the Boone East lease and the partial assignments, all make
19 clear that they relate to each other.

20 And the mantra of saying that there's nothing in the
21 lease that says that the payment agreement is integrated into
22 the lease is the wrong analysis. It's like going west when
23 you're supposed to be going east. This is a litigation about
24 the payment agreement. That choice was made by debtors'
25 counsel. And the question is: is this document integrated with

1 any other one? It's clearly integrated with each of the
2 partial assignments in the Boone East lease.

3 At this first hearing, nine months after the motion
4 was filed, we submit, Your Honor, that it is entirely
5 inappropriate that there be a judgment on the pleadings. We
6 will give Your Honor the assurance that if this goes to
7 discovery, which we believe it should, we will be efficient and
8 we will be prompt, and indeed, we've already collected
9 everything we need to collect.

10 We think we're talking about single-digit depositions,
11 maybe a Bankers Box, at most, full of documents. And we'd be
12 able to have a full trial on the merits before Your Honor,
13 according to a schedule that you'd like to set.

14 Unless you have any further questions, Your Honor,
15 I'll sit down. And if Mr. Martin has anything further to say,
16 I may stand up again.

17 THE COURT: All right. Thank you.

18 MR. BROMLEY: Thank you very much.

19 THE COURT: I have no questions at this time.

20 MR. MARTIN: Just briefly, if it's --

21 THE COURT: Mr. Martin, briefly?

22 MR. MARTIN: -- acceptable to the Court.

23 Your Honor, I'd note at the outset that Mr. Bromley
24 did not dispute that the payment agreement, standing on its
25 own, is not an executory contract. We can start where I did,

1 where Mr. Bromley says we have to start, with the payment
2 agreement. When you look at it, it is not executory. We pay
3 them money; they do nothing in return.

4 The next question, the question that brings us here
5 today, is whether they have made a plausible argument that some
6 other contract, a separate contract, makes it executory.
7 That's the reason for looking at the lease and for looking at
8 the assignments. And on that question, Your Honor, there is no
9 ambiguity, because the question here is whether the payment
10 agreement is made executory by those other contracts, which
11 means they have to be able to show that if we stop performing
12 on the payment agreement then there's something they can stop
13 doing for us, under either the lease or the assignments. Mr.
14 Bromley went through a long discussion about how tightly knit
15 these contracts are, and we've got a deep history, and we're
16 mining companies, and it's complicated, but he can't point to
17 anything that they can stop doing, under the terms of those
18 contracts, if we stop paying the payment agreement. That
19 means, as a matter of law, the payment agreement is not
20 executory.

21 Now, he says, well, maybe we'll find out that really
22 the parties intended for the payment agreement to be the lease
23 or the assignment. The contracts are clear, Your Honor. This
24 is another articulation of the it's-all-one-common-transaction
25 argument. The cases we cite in the papers, In re Craig, all of

1 them are clear. The mere fact that contracts are entered into
2 contemporaneously as part of the same transaction is not enough
3 to make them a single contract so that the breach of one is
4 automatically the breach of another. And that's the only way
5 they can make the lease or the assignments turn the
6 nonexecutory payment agreement into an executory contract.

7 On the assignments, Your Honor, Mr. Bromley didn't
8 identify anything, any performance that they can stop doing if
9 we stop paying the payment agreement. All that remains is the
10 indemnity.

11 Now, he brings up an arbitration clause. But you also
12 noticed, throughout that entire recitation, there wasn't a
13 single citation to any case that supports that, on the
14 arbitration clause or anything else. There is no reasonable
15 argument that, even based on all the factors they have
16 identified, that any of them supports even a plausible argument
17 that the payment agreement is made executory by the assignments
18 or the lease.

19 Mr. Bromley said the Section 23.7 is not really
20 game-over for them, because the payment agreement was entered
21 into on the same day, so it's not a prior agreement. Well, Mr.
22 Bromley leaves off the first sentence of 23.7, which says,
23 "This lease constitutes the sole and entire existing agreement
24 between the parties, and expresses all the obligations of and
25 restrictions upon the parties." A lease sets forth all

1 obligations of the lease. He also fails to note that the
2 payment agreement was structured in a very careful way. And it
3 says upon execution of this agreement, then Boone East and ERC
4 will execute the Boone lease. One happens first, then the next
5 one.

6 The parties knew what they were doing. If they didn't
7 mean what they said in 23.7, somebody would have said so. But
8 the payment agreement came first, then the lease. And the
9 lease is unmistakably clear, not just in Section 23.7, but in
10 other provisions of the lease, that there is no obligation
11 under the lease to pay the payment agreement. It is not rent
12 under the lease.

13 And just to clear up a misconception, I think Mr.
14 Bromley misspoke when he said that I had argued that the
15 assignments were fully executed on both sides. That's
16 obviously not the criterion here, Your Honor. A contract is
17 executory only if there is performance on both sides. Our
18 performance, what remains of it, doesn't make a difference
19 here. The question is whether there is performance on the
20 other side of these contracts. And for the assignments, there
21 is none that is material, and that's what matters for Section
22 365.

23 So for the assignments, there is an additional
24 argument that any contract here is not executory. For all the
25 reasons we said in our papers and I said today, there is no way

1 to read the assignments or the lease as requiring payment of
2 the payment agreement. And that means that the payment
3 agreement is not an executory contract.

4 Unless the Court has any questions, I will sit.

5 THE COURT: All right. Thank you.

6 Mr. Bromley, do you have anything else, briefly?

7 MR. BROMLEY: Just to say I disagree with everything
8 Mr. Martin said. But with that, I'll sit down, Your Honor.

9 THE COURT: Thank you.

10 All right, then, if there is nothing else on this
11 matter, I will take that motion under submission and I'll enter
12 a written order on the matter. And then I believe that
13 concludes everything.

14 There's one other matter, the Magnum Coal v.
15 Royaltyco, LLC, but I believe that matter has been continued?

16 MR. MARTIN: That's correct, Your Honor.

17 THE COURT: All right. All right, then I believe that
18 concludes everything on the printed docket this afternoon.

19 Are there any other requests, then, on behalf of the
20 debtor this afternoon?

21 MR. RESNICK: No, there are not, Your Honor.

22 THE COURT: All right. Thank you.

23 MR. RESNICK: Thank you.

24 THE COURT: Are there any other requests by any of the
25 other parties in the courtroom?

1 All right. Are there any other requests by any of the
2 parties on the telephone?

3 All right. Then hearing none, I have a couple of
4 announcements I'll make. I would like to, again, acknowledge
5 now that over 620 letters have been received, read by me, and
6 placed on the record as correspondence. As such letters
7 continue to arrive, I will continue to read them and place them
8 on the record. I thank all of those who have taken the time to
9 address the Court and share their thoughts.

10 I believe we have our future court dates, which would
11 be March 19th, April the 23rd, and May the 21st, all at 10 a.m.

12 And then I'd also like to state for the record that
13 there was a telephonic hearing that was held in this case on
14 Tuesday, February the 19th, 2013, regarding an emergency
15 request for additional time to respond to the debtors' motion
16 for authority to implement a compensation plan. The invited
17 parties were: counsel for the debtors, the United Mine Workers
18 Association Funds, the United Mine Workers Association, the
19 creditors' committee, and the U.S. Trustee's Office. I failed
20 to include Citibank, but they participated, nonetheless. I
21 also failed to include Bank of America, and I apologize for
22 that. Going forward, I will ensure that counsel for the
23 creditors' committee, Citibank, and Bank of America are all
24 invited to such telephonic hearings.

25 And finally, I'll remind people about appearances in

1 court. All parties that have entered their appearance in this
2 case are welcome to appear in person in court, or to request to
3 appear by telephone at all court hearings. If you are
4 requesting to appear by telephone, please do so no later than
5 three business days before the hearing, to my courtroom deputy,
6 John Howley. If you don't call three days ahead of time, you
7 don't get to get on the phone, as some people found out this
8 morning.

9 All right. I have nothing else.

10 Is it my understanding, Mr. Scherk and Mr. Turner, you
11 and your clients have a matter you would like to address with
12 the Court?

13 MR. TURNER: Good afternoon, Your Honor. We have been
14 asked by certain members of the lending syndicate if it would
15 be possible for them to appear telephonically in a listen-only
16 mode. Recently the debtor has filed its most recent 10-K.
17 Some of the members of the syndicate have become increasingly
18 focused on the case. And given that they are the likely
19 sources of funding -- potential further funding in a case
20 and/or upon exit, they have requested whether or not the Court
21 would be amenable to that listen-only request, Your Honor.

22 MR. SCHERCK: Your Honor, on behalf of Bank of
23 America, first of all, thank you for your latest announcement.
24 My client very much appreciates that, as far as telephonic
25 hearings. We would mirror the comments -- and I would also

1 add, we have a situation where Bank of America is an agent for
2 several other entities, and we are also a very, very large
3 creditor, and the funding for this case, the co-funding, I will
4 say, for this case, essentially, in a lot of ways, it is very,
5 very important to our client.

6 We would have one individual who would like to listen
7 only by phone, and this particular individual is the agent, and
8 he then has significant reporting requirements to other
9 entities that are part of this syndicate group. So for that
10 reason, I think at the end of the day we would save quite a bit
11 of time and money by allowing, if the Court would so permit,
12 this particular individual, as agent, to be able to hear what
13 transpires. He then will be able to report to the other
14 members of the investment syndicate group. And for that reason
15 we would like, again, to listen only. We would like this one
16 representative, who we requested to listen only, to be
17 permitted.

18 I know the Court has expressed a desire, previously,
19 not for that to occur, and we understand that and appreciate
20 that. But we're making this request, so we hope the Court will
21 reconsider its position and allow our one representative to
22 listen only telephonically. He happens to be located in Texas,
23 so travelling here would be very inconvenient, and we don't
24 want to necessarily have to go through that expense. But if he
25 could be permitted to listen only as the agent for this group,

1 we would very much appreciate that.

2 THE COURT: All right. Thank you.

3 Are there other parties in the courtroom that wish to
4 be heard on this request?

5 MR. HUEBNER: Your Honor --

6 THE COURT: Hold on. Let me start within the
7 courtroom, and then I'll get to the parties on the phone.

8 Mr. Resnick?

9 MR. RESNICK: That was Mr. Huebner.

10 THE COURT: Oh, all right.

11 MR. RESNICK: I'm not sure if it was, though.

12 THE COURT: I'm not sure who it was, but --

13 MR. HUEBNER: Well --

14 THE COURT: I'm --

15 MR. HUEBNER: -- it is Mr. Huebner, in fact.

16 THE COURT: Yes?

17 MR. HUEBNER: Good afternoon, Your Honor. Obviously,
18 what the Court decides to do with the telephonic appearance
19 request is obviously the Court's decision. I would note,
20 though, Your Honor, that we do try to save the estate's money
21 and professional fees wherever we can, which is essentially
22 why I am not in attendance before you, which I hope you will
23 forgive me.

24 We do pay the fees and expenses of the DIP lenders,
25 and frankly, if the alternative is to have a representative

1 from each of Citibank and BofA travel into St. Louis for every
2 hearing at the expense of the estate, as opposed to being able
3 to dial in and simply listen, so that they can in fact report
4 back to our very valuable DIP lender constituencies, the debtor
5 certainly would have no objection, Your Honor, to
6 representatives from both Citi, the senior DIP agent, and Bank
7 of America, the second out DIP agent, being able to simply
8 listen in quietly, as they have suggested, so we can
9 ultimately -- you know, they certainly have a legitimate need
10 to understand and watch what's going on, and I think that we
11 would prefer that it be done as most cost-effectively as
12 possible, subject, obviously, in all events, to whatever the
13 Court's pleasure is on the topic.

14 THE COURT: All right. Thank you.

15 All right. Mr. Willard?

16 MR. WILLARD: Judge, briefly. Greg Willard for the
17 committee. I would echo Mr. Huebner's comments. At the end of
18 the day, all of these expenses, at some point, are going to
19 come out of our constituency's pocket. And I think, under the
20 circumstances, given the narrow scope of the request, and the
21 real benefits that I think it would derive for the various
22 parties, we would support the request, Your Honor.

23 THE COURT: All right. Mr. Goldstein?

24 MR. GOLDSTEIN: Your Honor, I wasn't prepared to speak
25 on any issue today. However, let me inform the Court that I

1 represent a significant holder of the debtors' bond debt. We
2 have asked for a place on the committee. As of yet, that
3 matter has been taken under submission. I've been asked to
4 report on developments. My client pointed out that these bonds
5 are trading in the public markets, and if someone who is not an
6 attorney can have access to real time information, my client,
7 I'm sure, would insist to ask me to.

8 THE COURT: Thank you, Mr. Goldstein. I think you
9 point out part of my dilemma.

10 Mr. Scherck?

11 MR. SCHERCK: Thank you, Your Honor. One other
12 comment. I made an inaccurate statement. It is possible,
13 although not likely, that other members of the Bank of America
14 group may want to listen in, and I want to be candid with the
15 Court about that. Although it's not a likelihood, but it
16 certainly is a possibility that other investors in this
17 investor syndicate group may want to listen in at some point.
18 And obviously, we would go through the process and provide the
19 names to Mr. Howley, if there would be more than one person.
20 So I wanted to clarify that. Thank you, Your Honor.

21 THE COURT: Thank you.

22 Mr. Turner?

23 MR. TURNER: And Your Honor, that's certainly the case
24 with regards to Citibank. We've gotten specific requests from
25 members of the syndicate to, if possible, participate. Thank

1 you.

2 THE COURT: All right. Gentlemen, I'll take the
3 requests under submission. I want to think about this some
4 more, and think about -- of course, that is the main issue that
5 comes up for me is how do I stop with just your clients? How
6 do I stop with -- I have requests from the media, can I just
7 participate by phone, which is probably never going to happen,
8 but those requests come about. So I will contemplate the
9 request and I'll have Mr. Howley get back with everyone on
10 that.

11 MR. SCHERCK: On behalf of Bank of America and its
12 group, thank you very much, Your Honor, for taking this up
13 today.

14 THE COURT: All right. Thank you. No problem. All
15 right, then, are there any other requests, then, this afternoon
16 by any parties present in the courtroom?

17 All right. Then hearing none, are there any other
18 requests by any of the parties appearing on the telephone?

19 All right. Then hearing none, we'll be in recess.
20 Thank you.

21 MR. RESNICK: Thank you, Your Honor.

22 THE COURT: Thank you.

23 (Whereupon these proceedings were concluded at 12:49 PM)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D-569

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Date: February 27, 2013

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UNITED STATES BANKRUPTCY COURT
Eastern District of Missouri
Thomas F. Eagleton U.S. Courthouse
111 South Tenth Street, Fourth Floor
St. Louis, MO 63102

In re: Debtor(s):
Patriot Coal Corporation

Case No.: 12-51502 -A659

CHAPTER 11

Notice of Filing of Transcript and of Deadlines Related to Restriction and Redaction

To: All Persons of Record at Hearing

A transcript of the proceeding held on February 26, 2013 was filed on February 27, 2013.

The following deadlines apply:

If you wish to have personal data identifiers redacted from the transcript, a *Request for Transcript Redaction* must be filed within 7 days of the date of this notice: March 6, 2013. Personal data identifiers **include: social security numbers, financial account numbers, names of minor children, and dates of birth**. If no such request is filed within the allotted time, the Court will presume redaction of personal data identifiers is not necessary.

Any party seeking redaction shall file a *Statement of Transcript Redactions* identifying the location of the personal data identifiers sought to be redacted within 21 days of the date of this notice: March 20, 2013. The party filing the statement shall serve it by regular mail upon all parties at the hearing and shall include a Certificate of Service listing the date and parties served. The *Statement of Transcript Redactions* event will be restricted from public view and cannot be served electronically through the CM/ECF system. If no *Statement of Transcript Redactions* is filed within the allotted time, the Court will presume redaction of personal identifiers is not necessary.

Any party may file a response in opposition to the Statement within 7 days of the date the Statement is filed using the *Response to Statement of Transcript Redactions* event. If a response in opposition to the Statement is filed, the Court will rule on the matter. If a hearing is needed, the Court will send notice of hearing.

If a request for redaction is filed, the redacted transcript is due within 31 days of the date of this notice: April 1, 2013.

The transcript may be made available for remote electronic access upon expiration of the restriction period, which is 90 days from the date of filing of the transcript: May 28, 2013, unless extended by court order. However, during this 90-day period the transcript is available for viewing only during normal business hours at the Clerk's office.

Any questions regarding the transcript process should be directed to Matt Parker, Director of Courtroom Services, at (314) 244-4801.

FOR THE COURT:

/s/Dana C. McWay
Clerk of Court

Dated: 2/27/13

Copies Mailed To:

Brian C. Walsh, Bryan Cave LLP, 211 N. Broadway, Suite 3600, St. Louis, MO 63102
Rev. 12/10